

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DVI FINANCIAL SERVICES, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 00-CV-1666
	:	
ROBERT L. KAGAN, M.D., MAGNETIC	:	
IMAGING SYSTEMS I, LTD., and	:	
MRI SCAN CENTER, INC.,	:	
	:	
Defendants.	:	
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MEMORANDUM

ROBERT F. KELLY, J.

JUNE 21, 2001

Presently before this Court is the Motion for Summary Judgment against Robert L. Kagan, M.D. and MRI Scan Center Inc. ("Kagan" and "MRI Scan Center" or collectively "Defendants") filed by Plaintiff DVI Financial Services Inc. ("DVI").¹ DVI filed this action after Defendants defaulted on lease and loan payments. For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

Since 1983 Kagan has owned and operated magnetic resonance imaging ("MRI") centers. In September, 1996, Kagan sold his MRI business, which was called MRI Scan Center, to Metropolitan Health Networks, Inc. ("Metropolitan") and became an

¹ Default was entered against the third Defendant, Imaging Systems I, Ltd. on January 8, 2001 for failure to appear, plead or otherwise defend (Dkt. No. 5).

employee of Metropolitan. Up until that time, Kagan had been president of Nuclear Magnetic Imaging, Inc., which was the general partner of Magnetic Imaging Systems I, Ltd. ("Magnetic Imaging"), the partnership which owned his MRI business.

At various times during 1996, DVI provided financing for various pieces of Defendants' MRI equipment. The Master Equipment Lease ("Lease") identified Magnetic Imaging as the lessee. Pursuant to this Lease, DVI financed numerous pieces of equipment under five separate schedules. DVI also made a loan to Magnetic Imaging evidenced by a Loan and Security Agreement ("Loan"). The Lease and Loan were signed by Kagan in his individual capacity. In connection with the financing, Kagan, again in his individual capacity, also signed three personal unconditional continuing guaranties ("personal guaranties") dated March 25, 1996, August 27, 1996, and October 10, 1996.

In 1999, Kagan re-acquired his MRI business from Metropolitan and continued to operate it under the name MRI Scan Center. Under the Global Settlement Agreement entered into between Kagan and Metropolitan as part of the re-acquisition, Kagan became "responsible for the payment of the Equipment Leases on the MRI Scanners commencing on December 1, 1999 and thereafter." (Pl.'s Mot. for Summ. J., Ex. 7, ¶ 3.B; see also Ex. 7, ¶ 10).

The payment obligations owed to DVI are currently in

default. Despite DVI's demands, Defendants refuse to make payments. Therefore, on March 30, 2000, DVI filed this suit demanding judgment against the Defendants for the amount owed under the Lease and Loan. Discovery closed on January 8, 2001, and the dispositive motion deadline was January 29, 2001. DVI filed the present Motion for Summary Judgment on January 10, 2001. Defendants moved to amend their Answer to the Complaint on February 9, 2001. Defendants' Motion to Amend was denied by this Court in DVI Fin. Servs., Inc. v. Kagan, NO. 00-1666, 2001 WL 299272 (E.D. Pa. Mar. 23, 2001).

II. STANDARD

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and 'the moving party is entitled to judgment as a matter of law.'" Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues

of material fact.² Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the non-movant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

In its current motion, DVI claims that summary judgment is appropriate against Kagan based upon the three personal guaranties that he signed and based upon the Global Settlement Agreement entered into between himself and Metropolitan in which he assumed liability for payments on the equipment leases after December 1, 1999. DVI claims that summary judgment is appropriate against MRI Scan Center based on the principles of successor liability. DVI argues that MRI Scan

² "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Prof'l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

Center is the direct successor of the original lessee, Magnetic Imaging, and Metropolitan and thus it is responsible for its predecessors' liabilities.

Defendants, in their Response to the Motion for Summary Judgment, claim that the third personal guaranty, dated October 10, 1996, is a forgery. Defendants also claim that Kagan was induced to sell his MRI business to Metropolitan by DVI's and Metropolitan's allegedly false promises to release him from the three personal guaranties. Therefore, Kagan claims that DVI is equitably estopped from enforcing the personal guaranties. Defendants further argue that DVI has committed acts in bad faith and has breached section 1.3(h) of the personal guaranties which states that "without in any way limiting the foregoing, the Guarantor hereby waives any other act or omission of the Secured Party (except acts or omissions in bad faith) which changes the scope of the Guarantor's risk." (Pl.'s Mot. for Summ. J., Ex. 3, § 1.3(h); Ex. 4, § 1.3(h); Ex. 5, § 1.3(h)). Specifically, Defendants claim that because DVI engaged in bad faith acts, the three personal guaranties are void. Lastly, Defendants claim that MRI Scan Center does not have successor liability for its predecessors' debts.

A. The Three Personal Guaranties

1. Forgery

In their Answer to the Complaint, Defendants admit that

Kagan signed the three personal guaranties. (Complaint, ¶ 15 and Answer, ¶ 15). Furthermore, Defendants fail to raise the affirmative defense of forgery in their Answer. However, in their Response to the Motion for Summary Judgment, Defendants claim for the first time that the third personal guaranty, dated October, 10, 1996, is a forgery. Admissions in a pleading are binding on a party even if the party's post-pleading statements contradict the admissions. Travelers Indem. Co. v. Engel, No. 92-4866, 1994 WL 398788, at *3 (E.D. Pa. July 29, 1994). Therefore, Defendants' admissions in their Answer that Kagan signed the three personal guaranties are binding upon them. Furthermore, under Pennsylvania law, forgery is an affirmative defense, Id. at *5 (citing Zarnecki v. Shepegi, 532 A.2d 873, 875 (Pa. Super. 1987); Commonwealth Dep't. of Transp. v. Kmetz, 564 A.2d 1040, 1043 (Pa. Commw. 1989)), and "matters treated as affirmative defenses under state law are generally treated in the same way by federal courts in diversity cases." Id. (quoting Charpentier v. Godsil, 937 F.2d 859, 863 (3rd Cir. 1991)). Therefore, this Court recognizes that forgery is an affirmative defense. The failure to raise an affirmative defense by responsive pleading or by appropriate motion results in the waiver of that defense absent court permission to raise the defense later. Id. (citing Charpentier, 937 F.2d at 863; Equal Employment Opportunity Commission v. U.S. Steel Corp., 921 F.2d

489, 491-92 n.2 (3d Cir. 1990)); FED. R. CIV. P. 8(c). Here, this Court has already denied Defendants' Motion to Amend their Answer. See DVI Fin. Servs., 2001 WL 299272. Therefore, Defendants have waived the affirmative defense of forgery by failing to properly raise it and are precluded from raising it further in this action.

2. Equitable Estoppel

Likewise, in Defendants' Response to the present Motion for Summary Judgment, Defendants claim for the first time that DVI is equitably estopped from enforcing the personal guaranties. Defendants failed to raise the affirmative defense of equitable estoppel in their Answer. Like forgery, equitable estoppel is an affirmative defense. Sneberger v. BTI Ams., Inc., No. 98-932, 1998 WL 826992, at *8 (E.D. Pa. Nov 30, 1998)(quoting Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 416 (3d Cir. 1990) for the proposition that "[e]quitable estoppel is not a separate cause of action. It may be raised either as an affirmative defense or as grounds to prevent the defendant from raising a particular defense."); FED. R. CIV. P. 8(c). Therefore, Defendants have also waived the affirmative defense of equitable estoppel by failing to properly raise it and are precluded from raising it further in this action. Charpentier, 937 F.2d at 863.

3. Bad Faith/Section 1.3(h)

Defendants list examples of acts that they claim DVI

performed in bad faith in violation of general contract principles and section 1.3(h) of the personal guaranties.³ Defendants claim that because DVI allegedly committed these bad faith acts, the personal guaranties are void. DVI does not discuss any general contract principles, but does claim that 1.3(h) is not triggered because: (1) some of the listed acts do not change the scope of Kagan's risk, a prerequisite to the use of section 1.3(h); and (2) under section 1.3(g), Kagan waived defenses concerning DVI's release of collateral and thus those acts dealing with the release of collateral are not applicable to the analysis. After viewing the evidence in the light most favorable to the Defendants, genuine issues of material fact remain regarding whether DVI did or did not commit acts of bad faith and violate section 1.3(h). Therefore, summary judgment on the issue of Kagan's liability under the three personal guaranties is inappropriate.

a. Solfanelli v. Corestates Bank, N.A.

During the May 29, 2001 oral arguments on this Motion, while discussing section 1.3(g) of the three personal guaranties which waived any defense concerning the release of collateral,

³ Section 1.3(h) of the personal guaranties states that "without in any way limiting the foregoing, the Guarantor hereby waives any other act or omission of the Secured Party (except acts or omissions in bad faith) which changes the scope of the Guarantor's risk." (Pl.'s Mot. for Summ. J., Ex. 3, § 1.3(h); Ex. 4, § 1.3(h); Ex. 5, § 1.3(h)).

Defendants cited Solfanelli v. Corestates Bank, N.A., 203 F.3d 197 (3rd Cir. 2000). Defendants claim that under Sofanelli, waivers of such defenses are void. Id. at 201 (stating that "a bank's duty to conduct a commercially reasonable sale is not waivable by any such contract terms. In particular, we have held previously that despite agreements between the parties, securities must be liquidated in good faith and in a commercially reasonable manner."). Although this Court is denying summary judgment on the issue of the bad faith claim, it is appropriate to discuss the Solfanelli decision.

The Solfanelli court's holding that the duty to conduct a commercially reasonable sale is not waivable by contract terms is not novel under Pennsylvania law. Generally there is a duty to conduct a commercially reasonable sale of collateral and a duty not to impair collateral. Id. at 201; Am. Acceptance Corp. v. Scott Hous. Sys., Inc., 630 F. Supp. 70, 73 (E.D. Pa. 1985) (stating that "[u]nder Pennsylvania common law, a creditor has a duty not to impair security in its control.") (citing First Nat'l Consumer Disc. Co. v. McCrossan, 486 A.2d 396, 399 (Pa. Super. 1984)); McKeesport Nat. Bank v. Rosenthal, 513 A.2d 434, 436 (Pa. Super. 1986)(stating same). However, there is another line of Pennsylvania cases and Federal cases interpreting Pennsylvania law which have carved out an exception to this general rule applicable to unconditional guaranties. These cases state that

when the guaranty at issue is unconditional, it is an absolute undertaking to pay a debt at maturity if the principal does not pay, and there is no affirmative duty to preserve collateral unless the guarantor relies on the collateral. Paul Revere Protective Life Ins. Co. v. Weiss, 535 F. Supp. 379, 384 (E.D. Pa. 1981), aff'd, 707 F.2d 1403 (3d Cir. 1982); Fireman's Fund Ins. Co. v. Joseph J. Biafore, Inc., 526 F.2d 170, 174 (3d Cir. 1975)(quoting Cont'l Leasing Corp. v. Lebo, 272 A.2d 193, 197 (Pa. Super. 1970)); Parker Hannifin Corp. v. Bradshaw, No. 91-1251, 1992 WL 150658, at *3 (E.D. Pa. Jun. 17, 1992); Sec. Pac. Nat. Trust (New York) v. Phila. Auth. for Indus. Dev., No. 88-3637, 1990 WL 156595, at *3 (E.D. Pa. Oct. 9, 1990)(citing McCrossan, 486 A.2d at 400); Am. Acceptance Corp., 630 F. Supp. at 73; McKeesport Nat. Bank, 513 A.2d at 436; but see Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996 (E.D. Pa. 1982); U.S.A. on Behalf of Small Bus. Admin. v. Chatlin's Dept. Store, Inc., 506 F. Supp. 108 (E.D. Pa. 1980).

Solfanelli is distinguishable from the current case because the guaranties at issue here are unconditional, unlike in Solfanelli.⁴ Therefore, Sofanelli does not bar the waivers in

⁴ Each of the guaranties is entitled "Unconditional Continuing Guaranty" and states that the "obligations hereunder are absolute and unconditional." (Pl.'s Mot. for Summ. J., Exs. 3-5). The guaranties also state that "The Guarantor agrees that it shall not be necessary, as a condition to enforce this Guaranty, that suit be first instituted against Debtor or that any rights or remedies against Debtor be first exhausted. It

section 1.3. Furthermore, as noted by DVI, it does not appear that the Sofanelli court intended to overrule the cases above which state that under an unconditional guaranty, the guarantor agrees to pay on a contract after the default of the principal without limitation and irregardless of issues such as preservation of security. (See Pl.'s Reply Br. in Supp. of Mot. for Summ. J., p. 7). However, as stated above, this determination does not end the inquiry into bad faith and thus, summary judgment cannot be granted on this ground.

B. The Global Settlement Agreement

Defendants do not dispute that Kagan signed the Global Settlement Agreement. Under sections 3.B and 10 of the Global Settlement Agreement, Kagan is "responsible for the payment of the Equipment Leases on the MRI Scanners commencing on December 1, 1999 and thereafter." (Pl.'s Mot. for Summ. J., Ex. 7, ¶ 3.B). Therefore summary judgment on the issue of whether Kagan is responsible for payment of the equipment leases after December 1, 1999 is appropriate.

C. Successor Liability

Generally, under Pennsylvania law, when one company sells or transfers all of its assets to a successor company, the successor does not acquire the liabilities of the transferor

being understood and agreed that the liability of the Guarantor hereunder shall be primary, direct, and in all respects unconditional. (Id.)

merely based upon the transfer of the assets. Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 107 (Pa. Super. 1981).

However, the general rule is inapplicable and liability does attach to the successor if the purchasing company is merely a continuation of the selling company. Id.; Childers v. Power Line Equip. Rentals Inc., 681 A.2d 201, 212 (Pa Super. 1996), appeal denied, 690 A.2d 236 (Pa. 1997). DVI claims that MRI Scan Center is simply a continuation of Magnetic Imaging and Metropolitan and thus it is responsible for its predecessors' liabilities. Defendants dispute this issue.

After viewing the evidence in the light most favorable to the Defendants, genuine issues of material fact remain regarding whether MRI Scan Center is simply the continuing successor of Magnetic Imaging and Metropolitan. Therefore, summary judgment on the issue of successor liability is inappropriate.

IV. CONCLUSION

Although Defendants have waived the affirmative defenses of forgery and equitable estoppel, summary judgment on the issue of Kagan's liability under the three personal guaranties must be denied because genuine issues of material fact remain regarding whether DVI committed acts in bad faith which violated section 1.3(h) of the personal guaranties. However, under the Global Settlement Agreement, summary judgment will be

granted on the issue of Kagan's liability under the equipment leases commencing December 1, 1999 and thereafter. Lastly, because there are genuine issues of material fact concerning whether MRI Scan is liable for its predecessor's debts under a theory of successor liability, summary judgment on that issue will be denied.

An Appropriate Order follows.

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v.	:	NO. 00-CV-1666
	:	
ROBERT L. KAGAN, M.D., MAGNETIC	:	
IMAGING SYSTEMS I, LTD., and	:	
MRI SCAN CENTER, INC.,	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 21st day of June, 2001, upon consideration of the Motion for Summary Judgment against Robert L. Kagan, M.D. and MRI Scan Center Inc. ("Kagan" and "MRI Scan Center" or collectively "Defendants") (Dkt. No. 6), filed by Plaintiff DVI Financial Services Inc. ("DVI") and any Responses and Replies thereto, and upon the oral arguments on the Motion held on May 29, 2001 in this Court, it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART as follows:

1. summary judgment on the issue of Kagan's liability under the Equipment Leases commencing on December 1, 1999 and thereafter is GRANTED;

2. summary judgment on the issue of Kagan's liability under the three personal guaranties is DENIED; and

3. summary judgment on the issue of successor

liability is DENIED.

BY THE COURT:

ROBERT F. KELLY, J.